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JUN 14 1949

In the Supreme Court of the United States

CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1948. 1949

No. 400. 71

FEDERAL POWER COMMISSION,

Petitioner,

v.

THE EAST OHIO GAS COMPANY,

STATE OF OHIO,

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Respondents.

**BRIEF ON BEHALF OF RESPONDENTS OPPOSING
THE GRANTING OF A WRIT OF CERTIORARI.**

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THE EAST OHIO GAS COMPANY,

STATE OF OHIO,

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Federal Power Commission (R. 170-180) is reported at 74 PUR (NS) 256. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197-206) is reported at 173 F.2d 429.

STATEMENT.

Petitioner, hereafter called FPC, in its statement has attempted to convey the impression that East Ohio is engaged in two businesses in Ohio, the selling of natural gas at retail and "in addition" the operation of large diameter, high pressure transmission lines for the transportation of out-of-state gas (FPC Brief, p. 5). Its statement accordingly should be supplemented as follows:

East Ohio is an Ohio corporation all of whose property is in Ohio (R. 13). For half a century it has been engaged in the direct local distribution of natural gas. It has attached to its lines more than 550,000 consumers in 69

municipalities of which the principal are Cleveland, Akron, Canton, Massillon and Youngstown (R. 16, 89). In each it has a local franchise and sells direct to domestic, commercial and industrial consumers under rates either fixed by municipal ordinance or fixed or approved by The Public Utilities Commission of Ohio. It has no other business (R. 25).

It sells no gas to distributing companies for resale (R. 16).

It transports no gas for other persons for hire or otherwise (R. 23).

It sells no gas to industrial consumers except through its local distribution lines (R. 16).

Admittedly, it has no rates and no service subject to FPC jurisdiction even if it were held to be a "natural-gas company."

More than three-fourths of its supply is out-of-state gas supplied by interstate pipe lines. The balance comes from its Ohio fields. Over half of its supply comes from the Hope Natural Gas Company and is delivered to East Ohio on the northern bank of the Ohio River. About one-fourth comes from Panhandle Eastern Pipe Line Company and is delivered to East Ohio at Maumee, Ohio, south of Toledo (R. 89). Both Hope and Panhandle Eastern are interstate pipe line companies whose rates to East Ohio have been fixed by the FPC (R. 22).

Like all large distributing companies East Ohio owns and operates the high pressure lines that connect its city plants to the points of delivery by the interstate pipe line companies. It happens that East Ohio's lines to accomplish this are longer than those of many distributing companies but no different in their purpose or operation.

Ever since the adoption of the first Public Utility Act in Ohio in 1911 East Ohio has been subject to regulation by the Ohio Commission. Every service that it renders is subject to regulation by Ohio. Every dollar of gas revenue that it has is produced from rates regulated by the State

of Ohio. Every item of property it has, including its high pressure lines, is depreciated at rates approved by the Ohio Commission and has been repeatedly valued by that Commission for rate making purposes. East Ohio is also regulated by Ohio as to accounting, financing, and other matters (R. 62).

In 1939 the FPC, in an *ex parte* proceeding and without a hearing, declared East Ohio to be a "natural-gas company" subject to its jurisdiction and made certain orders against East Ohio (R. 101-03). In doing so the FPC used a purely mechanical test of its jurisdiction by finding that there was an interstate movement of gas in the high pressure lines of East Ohio and by declaring that this was transportation, and the business of transportation, of natural gas in interstate commerce within the meaning of the Natural Gas Act. Over the years the FPC has made other similar orders against East Ohio but never in the ten years that have elapsed has it thought any one of its orders of sufficient importance to the administration of the Natural Gas Act to bring an enforcement proceeding under Section 20 of that Act. In 1947 the FPC made new orders in the case it started in 1939, to which East Ohio filed its Petition for Review in the United States Court of Appeals for the District of Columbia Circuit, resulting in the decision as to which a writ is now sought.

QUESTIONS PRESENTED.

East Ohio claimed below (R. 6-7) that it was exempt from FPC jurisdiction by reason of the language of Section 1(b) of the Natural Gas Act which declares that that Act "shall not apply to any *other transportation* or sale of natural gas or to the *local distribution of natural gas* or to the *facilities used for such distribution.*" (Emphasis supplied.)

It claimed that since all of its property served no other purpose than to supply local consumers its business was solely local distribution and its facilities, including high pressure lines, were used only for that purpose, within the exclusions of Section 1(b) of the Act.

It also claimed that the transportation through its own lines for its own local purposes of gas purchased by it at or near the Ohio boundary at prices regulated by the FPC was not transportation in a regulatory sense within the meaning of the Act but rather was "other transportation" within the exclusion of Section 1(b).

The FPC on the other hand, claimed (R. 202) that since an interstate movement of natural gas continued in East Ohio's lines, East Ohio was engaged in the transportation of natural gas within the meaning of the Natural Gas Act and therefore fully subject to its jurisdiction. It thus insisted upon the application of the purely mechanical test of an interstate movement which it was admitted continued in East Ohio's lines. There was, therefore, no issue before the court requiring any definition of interstate commerce.

The issues before the court required it to determine only (1) whether East Ohio's business is solely local distribution and its properties used only for such distribution, or (2) whether the transportation of its own gas for its own purposes of local distribution is transportation in any regulatory sense.

The FPC's brief makes a wholly misleading statement of the question below when it says, page 2:

"The main question presented is whether, by virtue of its ownership and operation of these transmission pipe lines, East Ohio is engaged in 'interstate commerce' within the meaning of Section 2(7) of the Natural Gas Act and hence is a 'natural-gas company,' subject to the Federal Power Commission's jurisdiction under that Act."

As noted, the main question was and is whether East Ohio is excluded from FPC jurisdiction by the provisions

of Section 1, to which all other provisions and sections of the Natural Gas Act are expressly subject.

The court below correctly stated that "The very heart of the instant controversy is the definition of the nature of East Ohio's business" (R. 198). It then found what could scarcely be denied: that East Ohio "is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high pressure lines, is devoted to that sole purpose" (R. 202). It therefore found that East Ohio was excluded from FPC jurisdiction under 1(b) of the Act both because it was engaged solely in local distribution and because it was not engaged in transportation of natural gas in interstate commerce in any regulatory sense within the meaning of the Act.

REASONS FOR DENYING THE WRIT.

1. **There is here no substantial question relating to the construction or application of the Natural Gas Act which has not been but should be settled by this Court.**

Reasons 2 and 3 urged by the FPC for granting the writ (FPC Brief, pp. 15-18) are devoted to an argument that the decision below is wrong. Reason 4 (FPC Brief, pp. 18-20) seems to claim that a substantial federal question exists. (Reason 1, which is based on a misconstruction of the opinion below, is discussed later.)

In support of its claim of a substantial federal question the FPC relies upon the purely mechanical test of continuous interstate movement as the sole test of its jurisdiction. This Court has repeatedly held both under the Natural Gas Act and under the Federal Power Act that a mechanical or technological test is not the exclusive test of FPC jurisdiction.

Most recently in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, at

page 512, this Court, speaking through Mr. Justice Rutledge, said:

"Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here." [Footnote omitted.]

That case recognized that the Natural Gas Act did not confer jurisdiction on the FPC over industrial sales in interstate commerce by even a "natural-gas company." However, if the claims of the FPC are sound, it would be held on the facts of that case that the continuance of an interstate movement of natural gas by the Anchor-Hocking Glass Company in its own lines after purchase makes that industrial company a "natural-gas company" within the meaning of the Natural Gas Act.

The court below did no more than apply to the undisputed facts of this case the weight which this Court held in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, should be given to the fact "that the predominant characteristic of the company's over-all operation is that of a local and intrastate service" (p. 521), and that

"The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.

"Nor do we think the exemption of 'facilities used in local distribution' exempts only those which do not carry any trace of out-of-state energy." (p. 531)

We suggest that a mere question of application of the clearly expressed exemption from jurisdiction, contained in Section 1(b) of the Natural Gas Act, to the business of a single company does not raise any question of construction

or any substantial question of application of the Act, particularly where, as here, the controversy only arises because of the FPC's blind insistence on purely physical, mechanical or technological grounds as the sole basis of its jurisdiction.

Nor does the question gain importance from the FPC's statement that it has held other companies to be natural gas companies if that means, as it must, that these holdings were also made on the basis of purely technological tests. For obvious reasons the great natural gas pipe lines do not run through thickly populated communities. The local distributing companies must always build high pressure lines of greater or less length to the interstate pipe lines to receive natural gas from them. *If the purely mechanical test of a movement of gas in interstate commerce in these connecting lines is alone sufficient to establish the FPC's jurisdiction, then it has jurisdiction over practically all local distributing companies contrary to the plain and expressed intention of the Natural Gas Act.* By the same test every industrial company operating a stub line from an interstate pipe line to its plant would be a "natural-gas company" subject to FPC jurisdiction.

However, a wholly fallacious theory of jurisdiction, already repudiated by this Court, does not gain substance merely from the fact that if sound it would be widely applicable.

2. The decision of the court below does not rest on any improper application of the decisions of this Court.

The first reason assigned by the FPC for granting a writ is the apparent claim that the court below has, in the language of Rule 38(c), "not given proper effect to an applicable decision of this Court."

To sustain this claim the FPC brief, as noted, misstates the question involved in this case by claiming that the main question is whether "East Ohio is engaged in

“interstate commerce” within the meaning of Section 2(7) of the Natural Gas Act” (FPC Brief, p. 2). It then claims that the court below defined interstate commerce so as to exclude “transportation within a single state as part of an interstate journey” (p. 13) and that this was “the basis for the ruling below” (p. 14).

None of these statements can be sustained upon a full and fair reading of the opinion. As previously noted, the real question was whether East Ohio’s operations are excluded from FPC jurisdiction under Section 1(b) which, as this Court has held, determines “the Act’s coverage.”¹

As noted, the court held that East Ohio was excluded from that jurisdiction both because of the local character of its business and properties and because the transportation of its own gas for its own purposes within the State of Ohio did not constitute transportation, or the business of transportation, in any regulatory sense within the meaning of the Natural Gas Act.

In making the latter holding the court particularly noted its awareness of the decisions of this Court as to the “ever-broadening concept of what constitutes interstate commerce” (R. 203) — a fairly direct statement that it did not in any wise overlook or fail to give full effect to those decisions.

It was at all times admitted in this case that an interstate movement of gas continues in East Ohio’s lines from points of connection with the interstate pipe lines for at least some considerable distance. No issue on that point was at any time made or discussed or decided.

Viewing its opinion as a whole the lower court merely refused to apply a solely mechanical test in determining the FPC’s jurisdiction and specifically held (a) that the transportation by East Ohio of its own gas for its own purposes of local distribution was not transportation in any

¹ *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 516.

regulatory sense and in effect came within the exclusion in Section 1(b) of "other transportation," and (b) that such transportation was incidental to and a part of local distribution and that all facilities used therefor were local distribution facilities, also within the exclusion of Section 1(b). Either holding excludes FPC jurisdiction even though an interstate movement of gas is continued in East Ohio's high pressure lines.

In determining these questions the court below not only recognized but correctly applied the applicable decisions of this Court.

We suggest that the petition for certiorari should be denied.

Respectfully submitted,

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